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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 SAMUEL DEL CIELO, )  
7 Plaintiff, ) No. CV-09-123-JPH  
8 v. ) ORDER GRANTING DEFENDANT'S  
9 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
10 of Social Security, )  
11 Defendant. )  
12 )

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13 BEFORE THE COURT are cross-motions for summary judgment noted  
14 for hearing without oral argument on August 27, 2010 (Ct. Rec. 13,  
15 18). Attorney Maureen J. Rosette represents plaintiff; Special  
16 Assistant United States Attorney David Burdett represents the  
17 Commissioner of Social Security (Commissioner). The parties have  
18 consented to proceed before a magistrate judge (Ct. Rec. 8). On  
19 April 6, 2010, plaintiff filed a reply (Ct. Rec. 20). After  
20 reviewing the administrative record and the briefs filed by the  
21 parties, the court **GRANTS** defendant's motion for summary judgment  
22 (**Ct. Rec. 18**) and **DENIES** plaintiff's motion for summary judgment  
23 (Ct. Rec. 13).

24 **JURISDICTION**

25 Plaintiff protectively applied for disability insurance  
26 benefits (DIB) on April 20, 2006, alleging disability beginning  
27 January 1, 1997 (Tr. 13). The application was denied initially and  
28

1 on reconsideration (Tr. 56-58, 61-62).

2 At a hearing before Administrative Law Judge (ALJ) Paul  
3 Gaughen on January 31, 2008, plaintiff, represented by counsel,  
4 and his spouse testified (Tr. 26-49). On July 3, 2008, the ALJ  
5 issued an unfavorable decision (Tr. 13-23). The Appeals Council  
6 denied Mr. Del Cielo's request for review on March 11, 2008 (Tr.  
7 1-3). Therefore, the ALJ's decision became the final decision of  
8 the Commissioner, which is appealable to the district court  
9 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for  
10 judicial review pursuant to 42 U.S.C. § 405(g) on April 22, 2009  
11 (Ct. Rec. 1,4).

#### 12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing  
14 transcript, the ALJ's decision, the briefs of both plaintiff and  
15 the Commissioner, and are briefly summarized here.

16 Plaintiff was 48 years old at onset on January 1, 1997, and  
17 51 on his last insured date (Tr. 29). He earned a bachelor's  
18 degree in accounting and worked as a "public accountant, non-  
19 licensed," and as a financial consultant (Tr. 31, 41, 85).  
20 Plaintiff states he last worked in 1996 but stopped due to what he  
21 later learned was bipolar disorder (Tr. 31-32). Mr. Del Cielo  
22 testified he was diagnosed with diabetes and heart disease in  
23 March 2000 [21 months before his insurance expired](Tr. 37).  
24 Around the same time, he experienced fatigue, numbness in his  
25 toes, leg pain with walking and extended standing, and no pain  
26 with sitting (Tr. 36-38). He had difficulty lifting and carrying.  
27 His spouse shoveled snow, carried groceries, and emptied the  
28 garbage because he could not (Tr. 39). In the fall of 2000,

1 catheterization testing revealed coronary artery disease (Tr. 38).  
2 Mr. Del Cielo alleges disability due to diabetes, coronary artery  
3 disease, bipolar disorder, depression, and anxiety (Tr. 33).  
4 Plaintiff indicates he did not socialize much but enjoyed playing  
5 pool and occasionally having friends over for dinner (Tr. 39-40).

#### 6 SEQUENTIAL EVALUATION PROCESS

7 The Social Security Act (the Act) defines "disability"  
8 as the "inability to engage in any substantial gainful activity by  
9 reason of any medically determinable physical or mental impairment  
10 which can be expected to result in death or which has lasted or  
11 can be expected to last for a continuous period of not less than  
12 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act  
13 also provides that a Plaintiff shall be determined to be under a  
14 disability only if any impairments are of such severity that a  
15 plaintiff is not only unable to do previous work but cannot,  
16 considering plaintiff's age, education and work experiences,  
17 engage in any other substantial gainful work which exists in the  
18 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
19 Thus, the definition of disability consists of both medical and  
20 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
21 (9<sup>th</sup> Cir. 2001).

22 The Commissioner has established a five-step sequential  
23 evaluation process for determining whether a person is disabled.  
24 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
25 is engaged in substantial gainful activities. If so, benefits are  
26 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
27 the decision maker proceeds to step two, which determines whether  
28 plaintiff has a medically severe impairment or combination of

1 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

2 If plaintiff does not have a severe impairment or combination  
3 of impairments, the disability claim is denied. If the impairment  
4 is severe, the evaluation proceeds to the third step, which

5 compares plaintiff's impairment with a number of listed

6 impairments acknowledged by the Commissioner to be so severe as to  
7 preclude substantial gainful activity. 20 C.F.R. §§

8 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P,

9 App. 1. If the impairment meets or equals one of the listed

10 impairments, plaintiff is conclusively presumed to be disabled.

11 If the impairment is not one conclusively presumed to be

12 disabling, the evaluation proceeds to the fourth step, which

13 determines whether the impairment prevents plaintiff from

14 performing work which was performed in the past. If a plaintiff is

15 able to perform previous work, that Plaintiff is deemed not

16 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At

17 this step, plaintiff's residual functional capacity ("RFC")

18 assessment is considered. If plaintiff cannot perform this work,

19 the fifth and final step in the process determines whether

20 plaintiff is able to perform other work in the national economy in

21 view of plaintiff's residual functional capacity, age, education

22 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),

23 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

24 The initial burden of proof rests upon plaintiff to establish  
25 a *prima facie* case of entitlement to disability benefits.

26 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*

27 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is

28 met once plaintiff establishes that a physical or mental

1 impairment prevents the performance of previous work. *Hoffman v.*  
2 *Heckler*, 785 F.3d 1423, 1425 (9<sup>th</sup> Cir. 1986). The burden then  
3 shifts, at step five, to the Commissioner to show that (1)  
4 plaintiff can perform other substantial gainful activity and (2) a  
5 "significant number of jobs exist in the national economy" which  
6 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
7 Cir. 1984); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (1999).

#### 8 STANDARD OF REVIEW

9 Congress has provided a limited scope of judicial review of a  
10 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
11 the Commissioner's decision, made through an ALJ, when the  
12 determination is not based on legal error and is supported by  
13 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
14 Cir. 1985); *Tackett*, 180 F.3d at 1097 (9<sup>th</sup> Cir. 1999). "The  
15 [Commissioner's] determination that a plaintiff is not disabled  
16 will be upheld if the findings of fact are supported by  
17 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
18 Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is  
19 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
20 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
21 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
22 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
23 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
24 evidence as a reasonable mind might accept as adequate to support  
25 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
26 (citations omitted). "[S]uch inferences and conclusions as the  
27 [Commissioner] may reasonably draw from the evidence" will also be  
28 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On

1 review, the Court considers the record as a whole, not just the  
2 evidence supporting the decision of the Commissioner. *Weetman v.*  
3 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(*quoting Kornock v.*  
4 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

5 It is the role of the trier of fact, not this Court, to  
6 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
7 evidence supports more than one rational interpretation, the Court  
8 may not substitute its judgment for that of the Commissioner.  
9 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
10 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
11 evidence will still be set aside if the proper legal standards  
12 were not applied in weighing the evidence and making the decision.  
13 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
14 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
15 support the administrative findings, or if there is conflicting  
16 evidence that will support a finding of either disability or  
17 nondisability, the finding of the Commissioner is conclusive.  
18 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 19 ALJ'S FINDINGS

20 The ALJ found plaintiff was insured for DIB purposes through  
21 December 31, 2001 (Tr. 13, 15). At step one he found although  
22 plaintiff worked after onset, Mr. Del Cielo has not engaged in  
23 substantial gainful activity (Tr. 15). At step two he found  
24 plaintiff suffered from the medically determinable impairments of  
25 bipolar disorder, diabetes, obesity, and coronary artery disease,  
26 but they were not severe before his disability insurance expired  
27 (Tr. 16). Accordingly, at step two the ALJ found plaintiff was not  
28 disabled as defined by the Social Security Act during the relevant

1 period (Tr. 22).

## 2 ISSUES

3 Plaintiff contends the Commissioner erred as a matter of law  
4 when he found Mr. Del Cielo's mental and physical impairments are  
5 not severe (Ct. Rec. 14 at 9-15), and when he assessed credibility  
6 (Ct. Rec. 14 at 15-16).

7 Asserting the ALJ's decision is supported by substantial  
8 evidence and free of legal error, the Commissioner asks the Court  
9 to affirm (Ct. Rec. 19 at 6).

## 10 DISCUSSION

### 11 A. Weighing medical evidence

12 In social security proceedings, the claimant must prove the  
13 existence of a physical or mental impairment by providing medical  
14 evidence consisting of signs, symptoms, and laboratory findings;  
15 the claimant's own statement of symptoms alone will not suffice.  
16 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
17 on the basis of a medically determinable impairment which can be  
18 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
19 medical evidence of an underlying impairment has been shown,  
20 medical findings are not required to support the alleged severity  
21 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cr.  
22 1991).

23 A treating physician's opinion is given special weight  
24 because of familiarity with the claimant and the claimant's  
25 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
26 1989). However, the treating physician's opinion is not  
27 "necessarily conclusive as to either a physical condition or the  
28 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,

1 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
2 treating physician than an examining physician. *Lester v. Cater*,  
3 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more weight is  
4 given to the opinions of treating and examining physicians than to  
5 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
6 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
7 are not contradicted, they can be rejected only with clear and  
8 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
9 ALJ may reject an opinion if he states specific, legitimate  
10 reasons that are supported by substantial evidence. See *Flaten v.*  
11 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir.  
12 1995).

13 In addition to the testimony of a nonexamining medical  
14 advisor, the ALJ must have other evidence to support a decision to  
15 reject the opinion of a treating physician, such as laboratory  
16 test results, contrary reports from examining physicians, and  
17 testimony from the claimant that was inconsistent with the  
18 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
19 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
20 Cir. 1995).

21 Plaintiff alleges the ALJ failed to properly credit the  
22 opinions of treating psychiatrist Joseph Kurtz, M.D., examining  
23 psychologist John McCrae, Ph.D., and reviewing psychologist James  
24 Bailey, Ph.D. The Commissioner answers the ALJ properly (1)  
25 rejected Dr. Kurtz's opinion because it is unsupported by clinical  
26 evidence and appears based on plaintiff's unreliable self-report  
27 (Ct. Rec. 19 at 9); (2) rejected Dr. McCrae's opinion because it is  
28 dated more than four years after plaintiff's last insured date



1 (Ct. Rec. 19 at 9-10), and (3) rejected Dr. Bailey's opinion  
2 because it is contradicted by other reviewing specialists who  
3 opined the evidence was insufficient to determine disability prior  
4 to plaintiff's last insured date (Ct. Rec. 19 at 10-11).

5 *Dr. Kurtz*

6 The ALJ notes within two months of starting psychotropic  
7 medication and stopping cocaine use [discussed more thoroughly  
8 below], plaintiff told Dr. Kurtz his mental condition improved. He  
9 was "feeling and sleeping well" (Tr. 22). The ALJ observes during  
10 plaintiff's treatment with Peter Ewing, M.D. (from June 2000 to  
11 May 2002), plaintiff made no complaints of any increased bipolar  
12 symptoms, nor of any significant leg or chest pain (Tr. 22). The  
13 ALJ accepted Dr. Kurtz's opinion plaintiff's symptoms appeared  
14 well-controlled with medication. The ALJ properly rejected Dr.  
15 Kurtz's opinion to the extent it appeared based on plaintiff's  
16 unreliable self-report. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216  
17 (9<sup>th</sup> Cir. 2005)(an ALJ is not required to credit opinions based on  
18 plaintiff's unreliable self reporting).

19 *Dr. McCrae*

20 More than four years after plaintiff's insurance expired, he  
21 was evaluated by Dr. McCrae (Tr. 308-315). He diagnosed bipolar  
22 disorder, most recent episode manic (Tr. 309). Dr. McCrae  
23 assessed marked limitations in several areas, including the  
24 ability to make decisions, perform routine tasks, and respond  
25 appropriately to and tolerate the expectations and pressures of a  
26 normal work setting. He assessed moderate limitations in five  
27 areas, including the ability to understand, remember and follow  
28 simple instructions (Tr. 310). The ALJ properly rejected this

1 opinion because it was rendered well after plaintiff's insurance  
2 expired and does not clearly relate to the relevant period. In  
3 order to receive disability insurance benefits, a claimant must be  
4 disabled as of the date his insured status expired. *Macri v.*  
5 *Chater*, 93 F.3d 540, 543 (9<sup>th</sup> Cir. 1996).

6 *Dr. Bailey*

7 On August 4, 2006, Dr. Bailey reviewed the record. He  
8 assessed marked and moderate limitations (Tr. 391-392) but opined  
9 plaintiff could do concrete tasks and work near others as long as  
10 the work was not cooperative (Tr. 393). The Commissioner  
11 accurately observes Dr. Bailey's opinion is contradicted by other  
12 reviewing professionals who opined the evidence of bipolar  
13 disorder is insufficient prior to plaintiff's last insured date,  
14 and Mr. Del Cielo presented no new evidence supporting his claim  
15 (Ct. Rec. 19 at 10, referring to Tr. 374-375). The ALJ is correct.

16 *Dr. Ewing*

17 The Commissioner points out the ALJ appropriately relied more  
18 heavily on the opinion of Dr. Ewing, who treated plaintiff during  
19 the relevant period, from June 2000 through May 2002, than on the  
20 examining and reviewing professionals (Ct. Rec. 19 at 9, Tr. 232-  
21 244). [The relevant period is January 1, 1997, through December  
22 31, 2001.] This is appropriate since a treating doctor's opinion  
23 is entitled to the greatest weight. *Fair v. Bowen*, 885 F.2d 597,  
24 604-605 (9<sup>th</sup> Cir. 1989). Dr. Ewing's records show no complaints of  
25 bipolar disorder symptoms, nor of any ongoing physical complaints.

26 To further aid in weighing the conflicting medical evidence,  
27 the ALJ evaluated plaintiff's credibility and found him less than  
28 fully credible (Tr. 21). Credibility determinations bear on

1 evaluations of medical evidence when an ALJ is presented with  
2 conflicting medical opinions or inconsistency between a claimant's  
3 subjective complaints and diagnosed condition. See *Webb v.*  
4 *Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

5 It is the province of the ALJ to make credibility  
6 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.  
7 1995). However, the ALJ's findings must be supported by specific  
8 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
9 1990). Once the claimant produces medical evidence of an  
10 underlying medical impairment, the ALJ may not discredit testimony  
11 as to the severity of an impairment because it is unsupported by  
12 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
13 1998). Absent affirmative evidence of malingering, the ALJ's  
14 reasons for rejecting the claimant's testimony must be "clear and  
15 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).  
16 "General findings are insufficient: rather the ALJ must identify  
17 what testimony not credible and what evidence undermines the  
18 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*  
19 *Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

20 The ALJ gave several clear and convincing reasons for his  
21 credibility assessment, including (1) plaintiff's allegations are  
22 unsupported by medical evidence; (2) treatment has been sporadic,  
23 and (3) plaintiff has inconsistently reported his drug use and  
24 employment history (Tr. 18-19).

25 (1) *Lack of medical evidence*. The ALJ observes the alleged  
26 severity of plaintiff's mental impairment is unsupported by the  
27 medical evidence (Tr. 20):

28 The claimant stopped his psychiatric counseling  
with Dr. Kurtz in June 1999 stating he was moving.

1 He told Dr. Kurtz at that time he was doing well  
2 and was selling his home and moving to Washington  
3 state. The claimant noted he was less irritable,  
had 150 clients, and had been trading stock for  
himself (Ex. 1F at Tr. 176).

4 The next medical reference is from the new patient  
5 consult on June 14, 2000 with Dr. Ewing wherein  
6 the claimant stated he had been on sabbatical in  
7 Washington state for 10 to 12 months (Ex. 4F at  
8 Tr. 233). There is no indication whether claimant  
9 remained on his psychotropic medications during  
that period of time or whether he received any  
10 mental health counseling, thus suggesting that the  
11 claimant's symptoms may not have been as serious  
12 as he has alleged . . .

13 The fact that he did not continue with any mental  
14 health counseling upon his return in June 2000 also  
15 leads to the conclusion that either the psychotropic  
16 medications were taking care of the situation or the  
17 claimant's initial condition was not completely  
18 related to a mental impairment, i.e., his cocaine use.

19 (Tr. 20).

20 Once a claimant produces objective medical evidence of an  
21 underlying impairment, an ALJ may not reject a claimant's  
22 subjective complaints based solely on a lack of objective medical  
23 evidence to fully corroborate the severity alleged, but it is one  
24 factor the ALJ may consider. See *Bunnell v. Sullivan*, 947 F.2d  
25 341, 345 (9<sup>th</sup> Cir. 1991)(en banc). Plaintiff's statements to Dr.  
26 Kurtz during the relevant period that after taking medication he  
27 was doing well, had many clients, was able to trade stock, and did  
28 not pursue further treatment undercut allegedly disabling  
symptoms.

29 (2) *Noncompliance*. In 2006 plaintiff told Dr. McCrae,  
30 without explanation, he received outpatient mental health  
31 treatment in the early 1980's and in 1997 [last treatment was nine  
32 years earlier], and has "not taken medication reliably in the last  
33 six years or so" (Tr. 312). An unexplained, or inadequately

1 explained, failure to seek treatment or follow a prescribed course  
2 of treatment can cast doubt on a claimant's sincerity. *Fair v.*  
3 *Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989). Plaintiff has alleged a  
4 lack of treatment due to losing insurance, but the ALJ correctly  
5 points out plaintiff continued treatment with Dr. Ewing during a  
6 period he claims he lacked insurance, rendering plaintiff's  
7 explanation inadequate (Tr. 19).

8 (3) *Inconsistent reports of drug use and employment.* In 2006  
9 plaintiff told Dr. McCrae he tried cannabis and cocaine in the  
10 late 1980's, but not since; has never used amphetamines or heroin,  
11 "has not used alcohol," and has had no difficulty with substance  
12 abuse (Tr. 312). The ALJ observes this is inconsistent with Mr.  
13 Del Cielo's statements to treating psychiatrist Dr. Kurtz in May  
14 1998, when plaintiff acknowledged his long-standing substance  
15 addiction history (Tr. 18, referring to Exhibit 1F; 146-147). This  
16 included cocaine, marijuana, tobacco, alcohol and xanax. At the  
17 beginning of his treatment with Dr. Kurtz, plaintiff admitted he  
18 was using one tenth of a gram of cocaine daily (down from his  
19 prior amount of a half gram daily, for more than five years),  
20 drank a pint of tequila with six beers one or two days a week, and  
21 used marijuana about ten times from 1997-1998. The ALJ notes

22 By July 17, 1998, less than three months after  
23 beginning treatment, the claimant noted feeling  
24 well, sleeping well and being in better control  
25 of his irritability. He also noted at that time  
26 he had been off cocaine for 3 weeks and was taking  
27 his psychotropic medications as prescribed by Dr.  
28 Kurtz.

26 In contrast, when the claimant presented to the  
27 Boulder Community Hospital on April 3, 1998, one  
28 month before seeing Dr. Kurtz, the claimant stated  
he had been off cocaine for ten years with the  
exception of the "little cocaine" he put on the  
mucous membrane of an aching tooth just prior to

1 the onset of the "jitters" that made him seek  
2 medical attention that very day.

3 (Tr. 18; Exhibits 1F, 3F).

4 Plaintiff told Dr. Kurtz in 1998 he averaged \$100,000 a year  
5 the preceding ten years as a self-employed financial analyst. The  
6 ALJ observes this statement conflicts with plaintiff's testimony  
7 he did not work after 1996 (Tr. 19). Similarly, ER records in  
8 April 1998 show plaintiff indicated he was working 16 hour days  
9 (Tr. 223). Although plaintiff proffers another meaning, that the  
10 income claimed is false and part of his bipolar symptomology (Ct.  
11 Rec. 14 at 11-12), the ALJ was entitled to rely on the  
12 inconsistency.

13 Inconsistent statements diminish credibility. *Thomas v.*  
14 *Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002).

15 The ALJ correctly relied on several factors, including  
16 infrequent treatment for allegedly disabling symptoms and  
17 inconsistent statements when he found Mr. Del Cielo less than  
18 completely credible (Tr. 18-19).

19 The ALJ's reasons for finding plaintiff less than fully  
20 credible are clear, convincing, and fully supported by the record.  
21 See *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002)  
22 (proper factors include inconsistencies in plaintiff's statements,  
23 inconsistencies between statements and conduct, and extent of  
24 daily activities). Noncompliance with medical care or unexplained  
25 or inadequately explained reasons for failing to seek medical  
26 treatment also cast doubt on a claimant's subjective complaints.  
27 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885 F.2d 597, 603  
28 (9<sup>th</sup> Cir. 1989).

The ALJ's reasons for rejecting some of the opinions of  
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1 plaintiff's mental limitations are specific, legitimate and  
2 supported by substantial evidence. Significantly, as the ALJ  
3 points out, there is no opinion in the record by a treating source  
4 indicating plaintiff's mental impairments interfere with his  
5 ability to perform work-like activities.

6 **B. Physical impairment**

7 Plaintiff's opening brief asserts the ALJ erred when he found  
8 no severe physical limitations at step two. He does not argue  
9 error with respect to physical limitations in his reply brief (Ct.  
10 Rec. 20).

11 When he weighed the evidence of physical impairment, the ALJ  
12 again considered plaintiff's lack of credibility. He notes  
13 plaintiff stated he lost assets and money from investors during  
14 his manic phase. Plaintiff did not admit, as he told Dr. Kurtz in  
15 1998, charges were brought against him at the request of investors  
16 for allegedly fraudulent activities, and if convicted could result  
17 in a 3 to 5 year sentence (Tr. 19; Ex. 1F). The record contains no  
18 disposition. The ALJ observes Mr. Del Cielo's spouse told Dr.  
19 Kurtz plaintiff had a gambling problem, which may be another  
20 reason for financial losses other than bipolar disorder (Tr. 19;  
21 Ex. 1F).

22 In July 2000 plaintiff underwent cardiac catheterization and  
23 coronary angiography (Tr. 191-192). The ALJ points out in October  
24 2001, two months before his insurance expired, plaintiff walked 30  
25 minutes a day, 5 days a week, with no complaints of leg or chest  
26 pain (Tr. 20; Ex. 4F). Although plaintiff later underwent cardiac  
27 bypass surgery, the ALJ notes this was many years after  
28 plaintiff's last insured date (Tr. 22).

1 The ALJ observes there are no objective medical findings, nor  
2 any credible testimony, relating to symptoms during the relevant  
3 time frame that would support finding plaintiff had a severe  
4 medically determinable impairment, that is, one which would cause  
5 a significant interference in his ability to perform work-like  
6 activities from January 1, 1997 to December 31, 2001<sup>1</sup> (Tr. 22). As  
7 the ALJ correctly observes, Dr. Ewing's treatment records from  
8 June 2000 through May 2002 indicate plaintiff worked from his home  
9 as a financial consultant during that time frame (Tr. 19).

10 The ALJ is responsible for reviewing the evidence and  
11 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
12 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
13 trier of fact, not this court, to resolve conflicts in evidence.  
14 *Richardson*, 402 U.S. at 400. The court has a limited role in  
15 determining whether the ALJ's decision is supported by substantial  
16 evidence and may not substitute its own judgment for that of the  
17 ALJ, even if it might justifiably have reached a different result  
18 upon de novo review. 42 U.S.C. § 405 (g).

19 The Court finds the ALJ's assessment of the evidence is  
20 supported by the record and free of legal error.

#### 21 CONCLUSION

22 Having reviewed the record and the ALJ's conclusions, this  
23 court finds that the ALJ's decision is free of legal error and  
24 supported by substantial evidence..

#### 25 IT IS ORDERED:

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27 As the ALJ accurately observes, plaintiff's SSI claim was  
28 granted, as of April 20, 2006. As this date is well after  
plaintiff's last insured date, it has no bearing on his DIB  
claim (Tr. 13 at n. 1).

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT



1 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 18**) is  
2 **GRANTED.**

3 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
4 **DENIED.**

5 The District Court Executive is directed to file this Order,  
6 provide copies to counsel, enter judgment in favor of defendant,  
7 and **CLOSE** this file.

8 DATED this 2nd day of September, 2010.

9  
10 s/ James P. Hutton  
11 JAMES P. HUTTON  
12 UNITED STATES MAGISTRATE JUDGE  
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